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No. 96-425

In The

Supreme Court of the United States

October Term, 1996

ROBERT J. LOEW and DARREL L. MATTESON,

Petitioners,

v.

DEAN HIBBARD and H.D. GARRISON,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Colorado
Case No. 94SC757

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GILBERT GOLDSTEIN
3600 S. Yosemite
Suite 870
Denver, CO 80237
(303) 220-8200

* *Counsel of Record*

LAFF STEIN CAMPBELL
& TUCKER
DARREL L. CAMPBELL*
7730 East Belleview Avenue
Suite 204
Englewood, CO 80111-2618
(303) 740-7200

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

In 1988 the County of Adams, Colorado (the "County") adopted Ordinance No. 3 which was designed to eliminate "blighted areas" in the County. In pertinent part, the Ordinance provided that the exteriors of any commercial establishment or multi-family building shall be maintained so as to "present a neat and orderly appearance". Failure of the property owner to comply with the Ordinance requirements was deemed to be a "cause of blight" and subjected the owner to enforcement proceedings.

In the event of a violation of the Ordinance, a notice is given to the owner of the property directing that the property be brought into compliance. If the offending building is not removed, a hearing is held and an administrative law judge (ALJ) must make findings as to whether causes of blight exist. If the ALJ finds that such conditions exist and should be removed, an administrative order is issued requiring the owner to remove the causes of blight. Respondent Hibbard owned real property in Adams County upon which were located two commercial buildings, one of which had been damaged by fire in 1983 and had not been repaired. Respondent Garrison was living in the other building in which he maintained various items of personal property.

In 1989 the County alleged that Hibbard's property was maintained in violation of Ordinance No. 3 and gave notice to Respondents of such violation. A hearing was held before an ALJ who issued a written decision finding that certain "blight factors" existed on the property.

The ALJ's Order required the blight factors identified in the Order to be removed by a specified date. If the Respondents did not comply with the Order as directed, the County was authorized to enter onto the premises to remove the items described, and to charge the costs of such removal as a lien against the property.

When Respondents did not comply with the ALJ's order, the County then proceeded to "clean up" the property and remove the blight factors. In doing so the garage/shop building in which Garrison was living was demolished along with all of its contents. The garage/shop building was not the subject of the ALJ's blight removal order. According to one witness, Assistant County Attorney Matteson advised County Attorney Loew that the garage/shop building was not covered by the ALJ's order, but Loew ordered its destruction saying it would be "cheaper" to have the Respondents sue him.

Respondents then filed the within action. The Complaint sought a declaratory judgment that Ordinance No. 3 authorizing the destruction of buildings not presenting a "neat and orderly" appearance was invalid as not being authorized by any Colorado statute and was unconstitutionally vague. Respondents also sought a judgment for damages against the County and Petitioners Loew and Matteson based upon the destruction of the second building, the items of personal property inside the building and for the damage to the underground tank, pump and well.

After trial, the court determined that the ALJ's Order did not authorize the destruction of the second building nor the removal of personalty within it. It also found that

the individual Petitioners knew that the ALJ's Order did not apply to such items, but willfully ordered their destruction in violation of Respondents' constitutional rights. The court concluded that Respondents had been deprived of their civil rights without due process of law and that Respondents' property had been taken without just compensation. Hibbard was awarded $10,000.00 for the destruction of the second building and Garrison $3,500.00 for the personal property destroyed in the second building. The validity of Ordinance No. 3 was upheld by the trial court.

The Colorado Court of Appeals affirmed in part and reversed in part. The court held that Ordinance No. 3 was invalid for the reason that no state statute empowered the County to pass an ordinance authorizing the destruction and removal of buildings that do not present a "neat and orderly" appearance. The court held that the County was liable under 42 U.S.C. § 1983 because Ordinance No. 3 constituted a "policy" adopted by the County which resulted in the taking of Respondents' property without compensation and without due process of law. The court also held the County liable because of the individual County Attorneys' interpretation of the ALJ's Order to include the second building. The court reasoned that the interpretation placed on the ALJ's Order by the County Attorney and his assistant constituted the adoption of an official County policy and further that the County had specifically adopted this interpretation by urging the correctness of said interpretation both in the trial court and before the Court of Appeals.

The Court of Appeals held that the individual Petitioners Loew and Matteson were not entitled to qualified

immunity for the destruction of the second building since they "knew" that the ALJ's Order did not cover it. The individual Petitioners were charged with knowledge that the County's deliberate destruction of the private property constituted an unlawful taking without compensation and a denial of due process of law.

The Court of Appeals concluded that the trial court erred in refusing to award any damages for the underground tank, pump and well if such damage resulted from the County's unauthorized destruction of the fire damaged building. The court further determined that only the County and not the individual Petitioners would be liable for such destruction. Finally, the court remanded the matter for redetermination of attorneys' fees pursuant to 42 U.S.C. § 1988.

The Colorado Supreme Court granted certiorari with respect to the following two issues:

1. Whether the Court of Appeals erred in holding the County liable for destruction of property under 42 U.S.C. § 1983.

2. Whether the Court of Appeals erred in holding the County attorneys liable for destruction of property under 42 U.S.C. § 1983.

The Colorado Supreme Court first held that the Court of Appeals erred in holding the County liable under 42 U.S.C. § 1983. The Court reasoned that the two individual county attorneys were not "policy-makers" as a matter of law. The Colorado Supreme Court also held that the individual attorneys were liable under 42 U.S.C. § 1983. 918 P. 2d at 220-221. The court found that the

county attorneys deprived Respondents of their procedural and substantive due process rights by causing the destruction of their property. 918 P. 2d at 221.

CORRECTION OF MISSTATEMENT IN PETITIONERS' APPENDIX

The Appendix accompanying the Petition for Writ of Certiorari includes a copy of the decisions rendered by the district court, Colorado Court of Appeals and the Colorado Supreme Court.

Petitioners have misrepresented to this Court the opinion of the Colorado Court of Appeals. In response to a petition for rehearing the Colorado Court of Appeals modified its original opinion in several respects including the following paragraph which was substituted for the third paragraph found at p. 17a of Petitioners' Appendix:

> The county attorney testified that he was the highest ranking county official present at the property when the two buildings were destroyed, and, as such official, he was there "to oversee and give any direction, assistance, advice that I could." At that time, a "debate" over the question whether the second building was covered by the ALJ's order occurred. According to one witness, the assistant county attorney advised the county attorney that the order did not cover the second building, but the county attorney ordered its destruction on the basis that would be "cheaper" to have plaintiffs sue him. In any event, the two attorneys conferred with the county's zoning administrator who was responsible for directing the physical

work on the site, and a "consensus" was reached that the second building would be destroyed.

A copy of the pertinent part of the Colorado Court of Appeals' modification of the original opinion is set forth in the Appendix attached to Respondents' Brief.

REASONS FOR DENYING THE PETITION

I. The Colorado Supreme Court followed well settled decisions of this Court in upholding Respondents' Section 1983 civil rights claim for violation of Respondents' right to substantive due process

Petitioners' contention that the Colorado Supreme Court has, in the case at bar, created a new "generic" Section 1983 claim for alleged flagrant governmental conduct, is without basis. The Colorado Supreme Court in affirming Respondents' civil rights claim merely applied the long established decisional law of this Court and lower courts to the facts of this case. Those facts unequivocally confirm that Respondents were denied due process of law when Petitioners deliberately disregarded the law and deprived Respondents of their property.

The Due Process Clause of the Fourteenth Amendment serves to prevent governmental power from being used as an instrument of oppression. *Collins v. City of Harker Heights*, 503 U.S. 115, 126, 112 S. Ct. 1061, 1069, 117 L. Ed. 2d 249 (1989). Historically, it has been applied to deliberate decisions of government officials that deprive a person of life, liberty or property. *Daniels v. Williams*,

474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986). Due process protects citizens from the deprivation of liberty by deliberate abusive or harsh conduct by state officials. *Rochin v. California*, 342 U.S. 165, 169-171, 72 S. Ct. 205, 208-209, 96 L. Ed. 183 (1952); *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.), *cert. denied*, 474 U.S. 844, 106 S. Ct. 131, 88 L. Ed. 2d 108 (1985); *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123, 106 S. Ct. 1644, 90 L. Ed. 2d 189 (1986).

A substantive due process violation occurs when state's action is so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. *Sylvia Development Corp. v. Calvert County, MD*, 48 F.3d 810, 827 (4th Cir. 1995). The protection covers state action which is so "arbitrary and irrational, so unjustified by any circumstance or government interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by a post-deprivation state remedies". *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097, 112, S. Ct. 1175, 117 L. Ed. 2d 420 (1992).

Although not all misconduct by state officials is subject to redress under 42 U.S.C. § 1983, excessive force or other outrageous abuse of government authority directed against citizens is the type of misconduct which the remedies of Section 1983 were designed to deter. In the case at bar the conduct of the government officials in deliberately depriving Respondents of their property in open defiance of the law is so outrageous as to shock the conscience of the Court.

Intentional misconduct by government officials is properly redressed under Section 1983 where it evidences an outrageous abuse of government authority. When government officials abuse their offices, actions for damages may be the only realistic avenue for vindicated constitutional guarantees. *Harlow v. Fitzgerald,* 574 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982). To succeed on a civil rights claim for violation of substantive due process, a plaintiff must at least show that state officials were guilty of grave unfairness in the discharge of their legal responsibilities. *Silverman v. Barry,* 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied,* 488 U.S. 956, 109 S. Ct. 394, 102 L. Ed. 2d 383 (1988). Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flaunting of the law that trammels significant personal or property rights, qualifies for relief under Section 1983. *Silverman v. Barry,* at 1072.

The egregious conduct of Petitioners which gives rise to Respondents' civil rights claim for denial of due process is set forth in detail in the opinions of the district court, Colorado Court of Appeals and the Colorado Supreme Court. (See, Petitioners' Appendix) Each of the lower court opinions confirms that Petitioners deliberately flaunted the law and disregarded the State's fundamental process in ordering the destruction of Respondents' property. Although the state court opinions stress the reprehensible nature of the government officials' conduct in finding a violation of Respondents' civil rights, the request for review filed by Petitioners herein is conspicuous for its silence as to this issue.

In the district court's decision, the court found the evidence to be "incontrovertible" that the garage/shop

building (also known as the "Garrison residence") located toward the rear of the property was not contemplated in the County's blight request or the administrative law judge's Order to remove the blight. (Petitioners' Appendix, p. 4a) The trial court went on to find that Matteson "knew" the garage/shop building was not covered and so advised Loew. Despite such knowledge, Petitioners ordered the destruction of Respondents' property. (Petitioners' Appendix, p. 6a)

The Colorado Court of Appeals modified its original opinion to include the record excerpt establishing Loew and Matteson's knowledge of the unlawfulness of their actions:

> The County Attorney testified that he was the highest ranking County official present at the property when two buildings were destroyed, and, as such official, he was there to "oversee and give any directions, assistance, advice that I could". At that time, a "debate" over the question whether the second building was covered by the ALJ's Order occurred. *According to one witness, the Assistant County Attorney advised the County Attorney that the Order did not cover the second building, but the County Attorney ordered its destruction on the basis that it would be "cheaper" to have plaintiffs sue him.* In any event, the two attorneys conferred with the County's Zoning Administrator who was responsible for directing the physical work on the site, and a "consensus" was reached that the second building would be destroyed. (Emphasis added.) (Respondents' Appendix p. 2a)

The failure to include the final text of the Colorado Court of Appeals' modified opinion in Petitioners' Appendix or

in any way reference the modification reveals not only a lack of candor on the part of Petitioners but also a blatant attempt to avoid any mention of the egregious nature of Petitioners' conduct. Review of Respondents' civil rights claims cannot be accomplished in a vacuum.

In upholding Respondents' civil rights claim the Colorado Supreme Court stressed Petitioners' deliberate and willful abuse of authority. The Colorado Supreme Court noted that where the conduct of public officials results in the intentional and knowing destruction of private property such conduct should be repudiated and the subject of reproach. (Petitioners' Appendix, p. 45a) Any public official who knowingly and consciously acts outside the authority of the government to deprive citizens of their property, must answer for damages pursuant to Section 1983 for the deliberate deprivation of procedural and substantive due process rights.

There can be no question that a cause of action is established for violation of substantive due process where a party has been injured by the government's deliberate disregard of fundamental legal processes. *Roy v. City of Augusta*, 712 F.2d 1517, 1524 (1st Cir. 1983); *Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 264 (D.D.C. 1995); and *Bremiller v. Cleveland Psychiatric Institute*, 879 F. Supp. 782, 792 (N.D. Ohio 1995) (a Section 1983 claim can be maintained for substantive due process where the state actor's conduct shocks the conscience of the court. Under such circumstances the adequacy of any state remedy is irrelevant.)

Petitioners' insistence that Respondents' civil rights claim is nothing more than a garden variety land use

regulation case involving a taking ignores the government officials' conduct and the lack of any explanation that could justify the irrational and arbitrary abuse of government power. Respondents' property was not taken by the state for public or private use. Respondents' property was simply out and out destroyed by government officials, who although attorneys learned in the law, viewed themselves above the law, immune from the consequences of their acts.

Petitioners' argument that Respondents' due process claim is subsumed by the Just Compensation Clause of the Fifth Amendment is not persuasive. The Colorado Supreme Court did not err in resolving Respondents' claim based upon substantive due process principles.

This Court has previously rejected the position that one constitutional Amendment preempts the guarantees of another. The proper question is not which Amendment controls but whether either Amendment is violated. See, *Soldal v. Cook County*, 506 U.S. 56, 113 S. Ct. 538, 543, 121 L. Ed. 2d 450 (1992) ("Certain wrongs affect more than a single right, and accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter, the claim's 'dominant' character. Rather we examine each Constitutional provision in turn."); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50, 114 S. Ct. 492, 495, 126 L. Ed. 2d 490 (1993); *Albright v. Oliver*, 510 U.S. 266, 286-287, 114 S. Ct. 807, 820, 127 L. Ed. 2d 114 (1994), Souter, J., concurring.

The record in the within case establishes a violation of the Fifth Amendment prohibition against a taking

without just compensation and a violation of the Fourteenth Amendment right to due process of law. Petitioners attempt to compel Respondents to proceed solely on the taking claim without regard for any due process violation cannot be justified. No authority has been cited to support the proposition that the Fifth Amendment is the beginning and end of the constitutional inquiry when property has been deliberately taken by government officials contrary to law and without notice or hearing.

The case authority cited by Petitioners holding substantive due process inapplicable to land use disputes is not dispositive. To characterize Respondents' claim as a run of the mill local land use dispute involving a mere difference of opinion on development ignores the deliberate taking of property effected by high level government officials who knew their action was unlawful. Such conduct goes far beyond the outer limits of legitimate government action, and violates the Due Process Clause.

The Colorado Supreme Court's due process analysis of Respondents' civil rights claim cannot be dispensed as being redundant of a Fifth Amendment Just Compensation Clause taking claim. The Fifth Amendment provides no explicit textual source for the remedy afforded individuals who have been victimized by government officials flaunting the law without regard for the legal process. To adopt Petitioners' position is to condone the premise that when the damages resulting from a denial of an individual's rights are believed to be limited, it is both "cheaper" and proper under the law to deny the person's civil rights rather than afford him due process. Such reasoning flies in the face of the Fourteenth Amendment and the Congressional mandate of 42 U.S.C. § 1983.

The position urged by Petitioners represents an unwarranted extension of the *Albright* doctrine which is contrary to the well established law of this Court. No individual is above the law. Petitioners' blatant abuse of authority shocks the conscience. The deliberate and knowing destruction of private property constitutes a willful deprivation of civil rights without due process of law. Respondents' property can never be restored. Any post-deprivation remedy is irrelevant and could never adequately cure the violation of Respondents' rights because the constitutional tort was complete the moment the substantive due process violation occurred. See, *Zinermon v. Burch*, 494 U.S. 108, 126, 110 S. Ct. 975, 983, 108 L. Ed. 2d 93 (1990); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Petitioners' abuse of authority is the type of wrongful conduct for which 42 U.S.C. § 1983 was intended to provide relief.

II. The Colorado Supreme Court decision followed well established decisions of this Court in upholding Respondents' Section 1983 claim for violation of Respondents' right to procedural due process

In affirming Respondents' civil rights claim against the individual Petitioners, the Colorado Supreme Court held that Petitioners deliberately deprived Respondents of their right to procedural, as well as substantive due process. (Petitioners' Appendix, p. 45a) The procedural due process violation results from the finding that Petitioners knew the garage/shop building was not covered by the ALJ's Order, yet Petitioners ordered the building and its contents destroyed on the belief that a lawsuit

would be "cheaper" than according Respondents the benefit of the process contemplated under Ordinance No. 3. (Petitioners' Appendix p. 44a)

Petitioners made no attempt to comply with even the minimal due process notice procedures set forth in Ordinance No. 3. As the County's chief legal advisors, Petitioners knew that a building could not be removed as a blight factor unless notice was given to the owner and a hearing held before an administrative law judge who would then decide whether a cause of blight existed. (Petitioners' Appendix, p. 30a) Despite knowing that the garage/shop building was not covered by the ALJ's Order, Petitioners ordered its destruction without giving Respondents prior notice or the opportunity for hearing.

Government officials are entitled to qualified immunity only so long as their actions can reasonably have been thought to be consistent with the rights they are alleged to have violated. If, on the other hand, it is established that the official violated "clearly established law", the official may be held personally liable for the alleged unlawful action. *Anderson v. Creighton*, 483 U.S. 635, 638-639, 107 S. Ct. 3034, 3038-3039, 97 L. Ed. 2d 523 (1987). In the case at bar since the law concerning an individual's right to procedural due process was clearly established at the time of Petitioners' actions herein, Petitioners are personally liable for the violation of Respondents' right to due process.

The basic procedural due process protections afforded every individual by reason of the Fifth and Fourteenth Amendments to the Constitution have long been recognized as established law. The Court in *Mullane*

v. Central Hanover Bank & Trust, 389 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) recognized that due process requires any deprivation of life, liberty or property to be preceded by notice and an opportunity for hearing. In *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971) the Court held that procedural due process requires adequate notice and an opportunity to be heard at meaningful time and in a meaningful manner. See also, *Parratt v. Taylor*, 451 U.S. 527, 540, 101 S. Ct. 1908, 1915, 68 L. Ed. 2d 420 (1981) ("Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interest.")

Imputing to government officials' knowledge of the well established law concerning procedural due process is particularly appropriate in the instant case where the Petitioners are the County's chief legal advisors, licensed attorneys who are learned in the law. Petitioners Loew and Matteson were fully aware that if property owned by Respondents, but not listed in the ALJ's Order, was taken without first providing Respondents an opportunity for hearing, Respondents' right to due process of law would be denied. See, *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1382 (9th Cir. 1989), *cert. denied*, 498 U.S. 980, 111, S. Ct. 509, 112 L. Ed. 2d 528 (1990) (The principle of due process that an individual be given an opportunity for hearing before he is deprived of his life, liberty or property is so well established that reasonable state officers would have known of it.)

Petitioners also understood that once the building was razed and the personal property hauled to the landfill, Respondents would be forever deprived of their

property. Compelling Respondents to file a legal action for damages after the property was razed was in Petitioners' minds "cheaper" than providing Respondents with notice and the opportunity for hearing before the ALJ who had previously heard the County complaints and had not designated the garage/shop building as a blight factor. Rather than afford due process, Petitioners took the law into their own hands.

Petitioners' argument that the takings clause of the Fifth Amendment preempts any separate analysis of Respondents' procedural due process claim is direct contravention of the established case law confirming a citizen's right to notice and hearing before final deprivation of property rights. To follow such argument to its logical conclusion is to nullify the Due Process Clause in contravention of the Fourteenth Amendment.

The alleged preemption by the takings claim is also inconsistent with the case of *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) cited by Petitioners. In *Armendariz* the plaintiffs asserted both procedural and substantive due process claims. While the substantive due process claim was dismissed as being duplicative of the Fifth Amendment taking clause, the procedural due process claim, alleging a taking of property without predeprivation notice and hearing, was not found to be precluded by the Fifth Amendment. *Armendariz* confirms that the Fifth Amendment Just Compensation Clause cannot be considered an explicit textual provision of the Constitution which prohibits any additional relief for violation of procedural due process.

The Colorado Supreme Court properly upheld Respondents' Section 1983 claim for the intentional denial of Respondents' right to procedural due process. A more blatant denial of individual rights than presented in the case at bar is difficult to imagine, especially given the fact that Petitioners are licensed attorneys steeped in the procedural aspects of due process. Petitioners having ordered the demolition of a building known to not be covered by the ALJ's Order, and without prior notice or the opportunity for hearing, were properly held liable for the denial of Respondents' civil rights.

III. Respondents' due process claim was not satisfied by post-deprivation procedures available under Colorado law

A. The exceptions authorizing post-deprivation hearing to satisfy due process are not present in the within case

Petitioners acknowledge that the doctrine established by *Parratt v. Taylor*, supra, and its prodigy concerning post-deprivation state remedies satisfying the Due Process Clause has never been applied to the circumstances presented in the case at bar. A review of *Parratt* confirms that an extension of the *Parratt* doctrine is not warranted in the within case for the reason that the Colorado Supreme Court's decision upholding Respondents' civil rights claim for violation of procedural due process is consistent with the well established law of this Court.

The Court in *Parratt* noted that past cases mandate that some kind of hearing is required at some time before a state finally deprives a person of his property interest.

See, *Parratt v. Taylor*, 451 U.S. at p. 540, 101 S. Ct. at 1915. While acknowledging that a hearing must be provided before final deprivation, the Court recognized that in certain extraordinary situations, a post-deprivation hearing may satisfy due process. A post-deprivation hearing may be appropriate if there is a necessity for quick action by the state or it is impractical for the state to provide any meaningful pre-deprivation process and there is available, a meaningful means by which to assess the propriety of the state's action at some time after the initial taking. See, *Parratt v. Taylor*, 451 U.S. at p. 539, 101 S. Ct. at 1915.

The extraordinary circumstances authorizing a post-deprivation hearing in lieu of prior notice before a taking, are not present in the instant case. There was no need for immediate quick action to eliminate the garage/shop building as a blight factor. Prosecution of the blight claim had been pending for months prior to the razing of the building in November, 1989. Nor was it impractical to provide a hearing before the County demolished the building not covered by the ALJ's blight Order. Petitioners could have delayed demolition of the building until the ALJ had reviewed the County's request for an order specifically authorizing demolition of the garage/shop building as a blight factor. The means were available to assess the propriety of Petitioners' demolition order through an independent review by an ALJ. Despite the absence of any emergency requiring immediate action and the availability of independent review, Petitioners deliberately chose to ignore even the most rudimentary

elements of due process in the taking of Respondents' property.

The deprivation of Respondents' property rights became final once the building and its contents was demolished. Respondents were at that point no longer able to obtain timely judicial review of Petitioners' decision. The inadequacy of any post-deprivation hearing in such circumstances is obvious. The property owners could never be restored to the position they occupied before Petitioners deliberately chose to deprive Respondents of their property without notice or hearing. Post-deprivation review under such circumstances would not be due process.

The circuit courts' interpretation of *Parratt* supports Respondents' position herein. The case of *Burtnieks v. City of New York*, 716 F.2d 982, 988 (2d Cir. 1983) applied *Parratt* to a civil rights claim involving city officials who wrongfully ordered the demolition of a building without giving prior notice as required by the due process and the state's administrative code. In reversing the dismissal of the Section 1983 claim for violation of due process, the second circuit noted that under the *Parratt* doctrine before the question of the adequacy of post-deprivation state remedies is to be considered, the court must first find the necessity for quick action or the impracticality of providing any pre-deprivation process.

The ninth circuit in the case of *Chalkboard, Inc. v. Brandt*, supra, also addressed the deprivation of procedural due process occasioned by government officials who chose not to follow due process procedures specified by state law. In upholding the trial court's denial of the

state officials' motion for summary judgment the ninth circuit emphasized that at the time of the suspension, some pre-termination opportunity for hearing was required before deprivation of the property interest. By ignoring the procedures and summarily suspending the license without notice or opportunity to respond, the state officials would have known their actions were unlawful and denied due process. Absent the showing of an actual emergency, pre-termination notice and hearing was required.

The case law confirms that a post-deprivation hearing is only acceptable for due process purposes if an actual emergency exists making it impractical to provide a pre-deprivation notice. The Colorado Supreme Court recognized that no emergency was present in the within case and properly disregarded the claim that a post-deprivation hearing could satisfy Respondents' right to procedural due process of law.

B. Colorado law does not provide an adequate remedy if the State denies just compensation for the taking of an individual's property

Assuming for purposes of argument that the *Parratt* doctrine could be extended to land use cases like the case at bar, Respondents' injury would still be complete because adequate state procedures were not available to remedy the violation of procedural due process and assure just payment for property wrongfully taken.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 196, 105 S. Ct. 3108, 3121, 87

L. Ed. 2d 126 (1985), the Court recognized that the availability of an inverse condemnation claim under state law presented an adequate post-deprivation remedy which a plaintiff must pursue before bringing a claim for an unlawful taking under the Fifth Amendment of the Constitution. Petitioners now urge that the ripeness doctrine established in *Williamson* when read in conjunction with *Parratt* requires that Respondents herein exhaust their post-deprivation remedies under Colorado law before claiming a violation of due process under the Fourteenth Amendment. Although Respondents reject Petitioners' argument and assert that it unjustifiably seeks to extend the doctrines established in *Parratt* and *Williamson*, even if such rationale was extended to a land use case, it has no application in the case at bar.

Petitioners' contention that Respondents could have pursued a state inverse condemnation action as an adequate post-deprivation remedy is not supported by Colorado law. The Colorado Supreme Court in the case of *State of Colorado Department of Health v. The Mill*, 809 P. 2d 434, 437 (Colo. 1981) stated:

> We hold that for a litigant to be able to sue a state entity in inverse condemnation, the state entity must possess the power of eminent domain at the time of the taking.

See also, *City and County of Denver v. Desert Truck Sales, Inc.*, 837 P. 2d 759, 766 (Colo. App. 1992) (Assuming that a governmental agency has the power of eminent domain, inverse condemnation is a short hand description for the manner in which the landowner recovers just compensation for the taking of his property when condemnation proceedings have not been filed.)

The Colorado Court of Appeals struck down the County's Ordinance No. 3 to the extent that it purported to authorize the County to destroy and remove buildings that did not present a "neat and orderly" appearance. In so ruling, the Court of Appeals found the ordinance was not authorized under the County's enabling statute. (Petitioners' Appendix, p. 14a) The County's lack of condemnation authority is dispositive of Respondents' alleged right to pursue an inverse condemnation action for just compensation resulting from the County's enforcement of Ordinance No. 3. An inverse condemnation claim was not authorized under state law because the County did not have condemnation authority.

The circuit courts applying the *Williamson* obligation to exhaust post-deprivation state remedies, confirm that the availability of a state law inverse condemnation action is determinative of a property owner's duty to exhaust state law post-deprivation remedies. See, *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir.), *cert. denied*, 502 U.S. 1096, 112 S. Ct. 1174, 117 L. Ed. 2d 419 (1991) (In those states that allow an aggrieved property owner to bring an inverse condemnation action a Fifth Amendment takings claim is not ripe until the aggrieved party has used this procedure and been denied compensation); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990) (In order to state a claim for violation of the just compensation clause, a plaintiff must show that the inverse condemnation procedure is unavailable or inadequate); *Christensen v. Yolo County Board of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) (An action for compensation under state law will be deemed futile if a plaintiff can show a landowner is not

able to obtain just compensation through an inverse condemnation action); *Estate of Himelstein v. City of Ft. Wayne, Indiana*, 898 F.2d 573 (7th Cir. 1990); and *Crooked Lake Development, Inc. v. Emmet County*, 763 F. Supp. 1398 (W.D. Mich. 1991).

The ninth circuit in the case of *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir.), *cert. denied*, 488 U.S. 852, 109 S. Ct. 136, 102 L. Ed. 2d 109 (1988), considered the reasons why a property owner must show he has sought compensation through an inverse condemnation action before pursuing a Fifth Amendment takings claim. The circuit court in *Austin* noted that to prevail on an inverse condemnation action, the property owner must show that he or she has sought compensation and that the state denied it. Since this same proof is required for a Fifth Amendment taking claim, until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action, state procedures will be deemed adequate.

The availability of an inverse condemnation claim distinguishes the instant case from the cases of *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986) and *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996) cited by Petitioners. In *Yates* a state statute regulated inverse condemnation claims providing an adequate post-deprivation state procedure for compensation. The court in *Bateman* noted that the Utah legislature had specifically waived sovereign immunity in a statute authorizing recovery against the government for the taking of property without just compensation. The State of Colorado in contrast has no inverse condemnation statute nor does

the government immunity statute, Colorado Revised Statutes § 24-10-105 and 106, include any language specifically waiving sovereign immunity for an inverse condemnation taking.

The seminal case of *Parratt v. Taylor*, supra, is also distinguishable on the same grounds. In *Parratt* the Nebraska legislature had enacted a statute setting forth a tort claim procedure to pay the claims of prisoners housed in penal institutions. The state code procedure was available, but the inmate in *Parratt* chose not to use it.

Petitioners cannot cite any statutory provision passed by Colorado General Assembly establishing a state procedure whereby Respondents are entitled to prosecute an inverse condemnation claim in the circumstances presented in the within action. The Colorado Supreme Court decision in *The Mill* confirms that if the County lacked condemnation authority, Respondents could not have successfully pursued an inverse condemnation claim based upon the County's refusal to pay just compensation for property taken. The absence of any clearly defined and established state procedure setting forth a landowner's right to inverse condemnation refutes the argument that Respondents failed to exhaust post-deprivation state remedies.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

GILBERT GOLDSTEIN
3600 S. Yosemite
Suite 870
Denver, CO 80237
(303) 220-8200

* *Counsel of Record*

LAFF STEIN CAMPBELL
& TUCKER
DARREL L. CAMPBELL*
7730 East Belleview Avenue
Suite 204
Englewood, CO 80111-2618
(303) 740-7200

Attorneys for Respondents

October 17, 1996.

APPENDIX

COLORADO COURT OF APPEALS November 3, 1994

Case No. 93 CA 0593

Dean Hibbard and H.D. Garrison,

Plaintiffs-Appellees and Cross-Appellants

v.

County of Adams, State of Colorado; Robert J. Loew; and Darrel L. Matteson,

Defendants-Appellants and Cross-Appellees

Appeal from the District Court of Adams County
Honorable Michael A. Obermeyer, Judge
Honorable Cindy H. Bruner, Judge
No. 89CV2876

Division I Opinion by JUDGE CRISWELL Metzger and Kapelke, JJ., concur	JUDGMENT AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Opinion Modified, and as Modified, Petition for Rehearing, *DENIED*

Gilbert Goldstein, Denver, Colorado, Darrel L. Campbell, Denver, Colorado, for Plaintiffs-Appellees and Cross-Appellants

Gehler & Merrigan, Thomas E. Merrigan, Paula B. Gerlach, Commerce City, Colorado, for Defendants-Appellants and Cross-Appellees

OPINION is modified as follows:

Beginning on page 11, 28 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

~~The two individual defendants were present on plaintiffs' property during the clean-up activities; they were, as the trial court found, the highest ranking county officials present. While there, the two individuals, one of whom was present representing the County throughout the previous administrative hearing, interpreted the ALJ's order as authorizing the destruction of the second building and so advised the county officials who were in charge of the clean-up operation.~~

The county attorney testified that he was the highest ranking county official present at the property when the two buildings were destroyed, and, as such official, he was there "to oversee and give any direction, assistance, advice that I could." At that time, a "debate" over the question whether the second building was covered by the ALJ's order occurred. According to one witness, the assistant county attorney advised the county attorney that the order did not cover the second building, but the county attorney ordered its destruction on the basis that it would be "cheaper" to have plaintiffs sue him. In any event, the two attorneys conferred with the county's zoning administrator who was responsible for directing the physical work on the site, and a "consensus" was reached that the second building would be destroyed.

Beginning on page 13, 7 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

building. ~~and so advised the other county employees at the scene.~~

Beginning on page 15, 12 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

interpreting the ALJ's order and of ***advising*** ~~providing legal advise to~~ other county officials ~~based upon~~ ***of*** that interpretation. Hence,

Beginning on page 21, 16 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

(recognizing rule).~~; *Overland Development co. v. Martson Slopes Development Co.*, 773 P. 2d 1112 (Colo. App. 1989) (applying same rule to award of fees under private contract).~~

[Page 11]

The county attorney in Colorado is a constitutional officer, appointed by the county commissioners. Colo. Const. art. XIV, §8; §30-11-118, C.R.S. (1986 Repl. Vol. 12A). The duties and responsibilities of the office were described by our supreme court in *Medberry v. People*, 107 Colo. 15, 19, 108 P. 2d 243, 245 (1940), as follows:

> Under the statues of Colorado a county attorney is employed primarily as the legal advisor of the county commissioners in whose discretion reposes the power of appointment. . . . *In certain matters he advises other county administrative officers*, appears for the county in cases involving dependent, neglected and delinquent children, in lunacy inquests and, when directed by the county commissioners, in civil litigation to which the county is a party or in which it is interested. (emphasis supplied)

Further, if, as defendants argue here, the adopting of Ordinance No. 3 was an exercise of the County's zoning authority, the county attorney is specifically invested, by statute, with the responsibility of enforcing its provisions. *See*, 30-28-124(2), C.R.S. (1986 Repl. Vol 12A). Indeed, in asserting that their actions here were subject to an absolute immunity, the individual defendants affirmatively allege that one of the responsibilities of their offices is to enforce the provisions of Ordinance No. 3.

The county attorney testified that he was the highest ranking county official present at the property when the two buildings were destroyed, and, as such official, he was there "to oversee and give any direction, assistance, advice that I could." At that time, a "debate" over the

question whether the second [Page 12] building was covered by the ALJ's order occurred. According to one witness, the assistant county attorney advised the county attorney that the order did not cover the second building, but the county attorney ordered its destruction on the basis that it would be "cheaper" to have plaintiffs sue him. In any event, the two attorneys conferred with the county's zoning administrator who was responsible for directing the physical work on the site, and a "consensus" was reached that the second building would be destroyed.

With respect to the meaning and breadth of the ALJ's order, we are convinced that the interpretation placed upon it by the county attorney and his assistant constituted the adoption of an official county policy. Indeed, the County has specifically adopted that interpretation in these proceedings and has urged its correctness both in the trial court and before us. *See St. Louis v. Praprotnik, supra* (entity is liable for civil rights violation if it adopts policy of subordinate).

Given these circumstances, therefore, we conclude that the County is liable for any damages resulting to plaintiffs from the destruction of either building.

III. The Individual's Liability

Whether an individual public employee is a "policymaker," while important in determining the liability of a governmental unit under § 1983, is irrelevant in determining his or her own liability under that statute. This is so because, irrespective of the level of responsibility, a government official is

* * *